No. 86 1628

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL TELLIS,

Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY and PARKER HOUSE SAUSAGE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Congress did not enact a statute of limitations for civil RICO actions. The courts of appeals have taken conflicting approaches to the process of selecting the proper limitations period for such claims and have reached inconsistent results. The Court has granted certiorari in two cases presenting this general issue (Nos. 86-497 and 86-531, consolidated). They are presently awaiting argument.

The specific questions presented in the instant case are:

1. Whether a state limitations period or a federal limitations period should apply to civil RICO actions?

2. If state law applies, whether a single limitations period should govern all RICO claims arising within the state, or whether a period most appropriate to plaintiff's specific claim should be selected in each case?

3. Whether the court below, in attempting to identify the most analogous Illinois statute of limitations, correctly characterized civil RICO claims generally as "actions for a statutory penalty?"

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v.

UNITED STATES FIDELITY AND GUARANTY COMPANY and PARKER HOUSE SAUSAGE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Michael Tellis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on November 6, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 805 F.2d 741, and is reprinted in the appendix hereto, App. pp. 1-15, *infra.*

The memorandum opinion of the United States District Court for the Northern District of Illinois, Eastern Division (Grady, J.), has not been reported. It is reprinted in the appendix hereto, App. pp. 19-24, *infra*.

JURISDICTION

Petitioner commenced this action for damages in the United States District Court for the Northern District of Illinois, Eastern Division. Federal jurisdiction was invoked pursuant to the Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO"), 18 U.S.C. §§ 1961, *et seq.*, and particularly § 1964(c). On September 6, 1985, the district court dismissed petitioner's amended complaint on the ground that his claim was barred by the Illinois Workers' Compensation Act. See App. pp. 19-24, *infra*.

On petitioner's appeal, the Seventh Circuit, on November 6, 1986, entered judgment and an opinion affirming the dismissal, one judge dissenting, on the sole ground that petitioner's claim was barred by limitations. See App. pp. 1-15, *infra*. Petitioner filed a timely petition for rehearing with suggestion for rehearing *in banc*. The Court of Appeals denied the petition on January 9, 1987. See App. pp. 17-18, *infra*.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The RICO statute, 18 U.S.C., provides, in pertinent parts:

> § 1962(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> § 1962(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.
>
> § 1964(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

The Illinois Code of Civil Procedure, Ill.Rev.Stat. (1986), c. 110, provides in pertinent parts:

> § 13-202. Personal injury—Penalty. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversion . . . shall be commenced within 2 years next after the cause of action accrued. . . .
>
> § 13-205. Five year limitation. . . . [A]ctions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

STATEMENT OF THE CASE

Petitioner commenced this action in the District Court for the Northern District of Illinois on May 24, 1983. His amended complaint alleged that in 1979, while employed by respondent Parker House, petitioner had been injured on the job. Parker House and respondent U.S.F. & G., its workers' compensation insurance carrier, offered petitioner a lump-sum settlement of his claim under the Illinois Workers' Compensation Act. To induce him to accept this offer and to waive his right to obtain an award under the Act, respondents made certain false representations, both to petitioner and to the Illinois Industrial Commission, the agency which administers the Workers' Compensation Act, that petitioner would be returned to employment at Parker House in a "light duty" position. Such representations were made pursuant to a scheme to defraud developed by respondents, and the predicate acts and pattern of racketeering activity constituting a violation of the RICO statute, 18 U.S.C. § 1961 *et seq.*, were alleged. In reliance on such representations, petitioner accepted the settlement offer. Thereupon, in March, 1980, petitioner reported for work at Parker House, but was denied employment.

Petitioner's action was filed approximately three years and two months after respondent Parker House had refused to reemploy him. The district court dismissed the amended complaint on the ground that petitioner's claim was barred by the exclusivity provision of the Illinois Workers' Compensation Act (see App. pp. 19-24, *infra*). That court did not rule on the limitations issue, which had been raised in the motions to dismiss.

On appeal to the Seventh Circuit, the judgment of dismissal was affirmed, but solely on the ground that petitioner's claim had been barred by the Illinois two-year statute of limitations.

The Court of Appeals looked to the decision of this Court in *Wilson v. Garcia*, 471 U.S. 261 (1985), for the tests to be applied in selecting a statute of limitations for federal causes of action not subject to a specific federal limitations period. The court held that, as applied to this case, *Wilson* teaches that a state limitations period should govern, that a single limitations period should apply to all RICO claims arising in a state, that the limitations period selected should be the one applicable to state claims most closely analogous to the RICO claim, and that the characterization of the federal cause of action is a question of federal law. Applying these teachings, the court concluded that "[t]he treble damages provision, 18 U.S.C. § 1964(c), is the most significant aspect of civil RICO." (See App. p. 9, *infra*). And, of the two Illinois periods of limitation which might apply, the court decided that the two-year period applicable to "actions for a statutory penalty" (Ill.Rev.Stat. [1986], c. 110, par. 13-202) was more apt than the five-year period applicable to actions "for an injury done to property, real or personal" and to "all civil actions not otherwise provided for." Ill.Rev. Stat. (1986), c. 110, par. 13-205.

REASONS FOR GRANTING THE WRIT

PENDENCY OF ANOTHER CASE PRESENTING SIMILAR QUESTIONS

The Court has recognized the importance of the questions presented by granting certiorari in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, No. 86-497, and *Crown Life Ins. Co. v. Malley-Duff & Associates, Inc.*, No. 86-531. Both cases seek review of the same Third Circuit decision, reported *sub nom. Malley-Duff & Associates, Inc. v. Crown Life Ins. Co.*, 792 F.2d 341 (1986) (hereinafter "*Malley-Duff*"), which applied a Pennsylvania six-year "catchall" statute of limitations to civil RICO claims arising in that state.

The opinions of the courts below in *Malley-Duff* and in the instant case, both decided by divided courts, and the other cases we cite clearly show the conflict among the circuits about the questions presented. We recognize that, because *Malley-Duff* raises essentially the same issue, the Court may wish to defer consideration of the instant petition pending its decision in *Malley-Duff*, as it frequently has in comparable situations. See, *e.g.*, *Keney v. New York*, 388 U.S. 440 (1967); *Murray v. City of New York*, 308 U.S. 528 (1940). Petitioner has no objection to that or any procedure which will enable him ultimately to have his case considered in light of this Court's determination of the proper tests and procedures for selecting the civil RICO limitations period. Petitioner urges only that the Court not deny his petition before decision is rendered in *Malley-Duff*. If the Court should decide *Malley-Duff* in a way inconsistent with the Seventh Circuit decision in this case, that favorable decision would be of benefit to him only if this case remained viable and could be remanded to the Court of Appeals.

I.

CIVIL RICO CLAIMS SHOULD BE GOVERNED BY THE MOST ANALOGOUS STATE STATUTE OF LIMITATIONS, AS THE SEVENTH CIRCUIT HELD; IF FEDERAL LAW GOVERNS, THE FOUR-YEAR PERIOD FOR ACTIONS UNDER THE ANTITRUST LAWS SHOULD APPLY.

All parties contended in the court below that Illinois law should be the source of the controlling limitations period for claims arising in that state. That has been the general rule, and *Wilson v. Garcia*, 471 U.S. 261 (1985), so held with respect to civil rights actions under 42 U.S.C. § 1983.

So far as we have been able to determine no court of appeals has adopted a federal limitations period for civil RICO cases, but at least one district court has done so. *Bartels v. Clayton Brokerage Co. of St. Louis*, 631 F. Supp. 442 (S.D.N.Y., 1986). Judge Sloviter, concurring in the judgment in *Malley-Duff* (792 F.2d at p. 356) and in its companion case, *A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 337-341 (3d Cir., 1986), argues vigorously that federal law should govern and that the appropriate federal limitations period is the four-year period provided in the Clayton Act, 15 U.S.C. § 15b.

Judge Sloviter would follow *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). She finds no state statute of limitations to be closely analogous to RICO (a conclusion at least as valid in Illinois as in Pennsylvania). On the other hand, she finds a strong analogy between RICO and § 4 of the Clayton Act, 15 U.S.C. § 15. Both provide treble damages and attorney fees to the successful claimant; "[b]oth require the plaintiff to prove an injury 'in his business or property by reason of' a viola-

tion"; and Congress explicitly modeled the civil provisions of RICO on the Clayton Act, as this Court recognized in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). 792 F.2d at p. 340.

The instant case was argued before *A.J. Cunningham* and *Malley-Duff* were decided; hence, Judge Sloviter's theory ws first called to the attention of the court below in the petition for rehearing (p. 4). If the rationale of the Seventh Circuit—that the treble damage feature is the most distinctive aspect of the RICO civil remedy—is correct, then the Clayton Act limitations period appears most appropriate, especially as compared with the strained construction which equates the RICO claim with a statutory penalty under Illinois law. See III, *infra*. Accordingly, we adopt that theory as an alternative ground for relief, though we continue to assert as our primary position that a state statute should be selected.

II.

A SINGLE STATE STATUTE OF LIMITATIONS SHOULD GOVERN ALL CIVIL RICO ACTIONS ARISING WITHIN A STATE.

In the court below the parties agreed that the state limitations period for civil RICO actions should be uniform. *Wilson v. Garcia*, 471 U.S. 261 (1975). *Malley-Duff* and the decision of the Court of Appeals in the instant case so hold. Clearly to the contrary is *Silverberg v. Thomson McKinnon Securities, Inc.*, 787 F.2d 1079, 1083 (6th Cir., 1986). The cases in other circuits are less clear. In the Second Circuit neither *Cullen v. Margiotta*, No. 87-7066 et al. (slip op., Feb. 2, 1987), nor *Durante Bros. & Sons, Inc. v. Flushing National Bank*, 755 F.2d 239, 248-249 (1985), *cert. den.* ____ U.S. ____, 105 S.Ct. 3530 (1985), takes an explicit position on this issue, though both cases

adopted the same New York statute of limitations ("liability . . . created or imposed by statute"). See discussion in *Bankers Trust Co. v. Feldesman*, 648 F.Supp. 17, 27-31 (S.D.N.Y., 1986), where the court followed *Malley-Duff* in adopting the uniform approach and applied the same New York statute that the Court of Appeals had adopted in *Durante* and would later adopt in *Cullen*. The Ninth Circuit case seems to have adopted the uniform approach implicitly. *Compton v. Ide*, 732 F.2d 1429, 1433 (1984). A dictum in the Eleventh Circuit also suggests that the uniform approach would be followed by that court. *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1014, n. 4 (11th Cir., 1986). The district court cases are collected in the opinion below. See App. p. 5, *infra*.

Though we are prepared to argue that the court below did not correctly characterize the RICO cause of action and thus selected an improper limitations period under either the uniform or case-by-case approach (See III, *infra*), we submit that the uniform approach is to be preferred. The decision of the Court of Appeals to apply a uniform limitations period was based on *Malley-Duff*, 792 F.2d at 346-349, where it is stated that the reasoning of *Wilson v. Garcia*, that federal interests in uniformity, certainty and the minimization of unnecessary litigation, as well as avoidance of the appearance that selection of the appropriate limitations period is result-oriented, all apply equally to RICO. Further, the court in *Malley-Duff* emphasized that RICO has no counterpart in the common law and that any attempt to find different analogies in the limitations law of a state can only breed uncertainty and time-consuming litigation, particularly in situations where different state statutes might appear equally applicable to one case because of the RICO requirement of two predicate acts.

Requiring the federal courts to select a RICO limitations period on a case-by-case approach would lead to intolerable confusion and delay, and would create an appearance of arbitrariness and inconsistency not conducive to public confidence in our system of justice. Therefore, the selection of a single limitations period for each state is the better procedure.

III.

THE CHARACTERIZATION OF RICO BY THE COURT OF APPEALS AS ESSENTIALLY A TREBLE DAMAGES STATUTE IS ERRONEOUS. THERE IS NO ILLINOIS LIMITATIONS PERIOD ANALOGOUS TO RICO; HENCE THE "CATCHALL" PERIOD OF LIMITATIONS APPLIES.

Wilson v. Garcia, 471 U.S. 261 (1985), requires the court to characterize the RICO claim as a matter of federal law and then to select the most analogous state limitations period. This process has a deceptively simple appearance. As the wide difference of opinion reflected in the reported cases shows, the civil claim authorized by the RICO statute defies precise description. Moreover, the distinction between characterizing the RICO claim—a question of federal law—and selecting the most analogous state statute is difficult to maintain.

The majority of the Court of Appeals concluded that the best characterization is that RICO creates "an action for treble damages," equivalent to a statutory penalty under Illinois limitations law. See App. p. 9, *infra*. Judge Ripple's dissenting opinion (see App. pp. 11-15, *infra*) and *Malley-Duff* reject that conclusion for the reasons summarized below.

A. The focus of the majority opinion below is too narrow. The remedy—treble damages—does not capture the "essence" of the RICO civil action, which represents a unique

effort by Congress to curtail a broad spectrum of activity which is eroding the fabric of American social and economic life. Dissenting opinion, App. pp. 13-15, *infra*; *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). The misconduct defined by RICO is largely without analogy in the common law, so that any search for such analogy is doomed to failure. *Malley-Duff*, 792 F.2d at 348. The "predicate acts" requirement does not relegate RICO to a role as ". . . no more than a federal surcharge against conduct already forbidden under state law." Dissenting opinion, App. p. 13, *infra*. Thus it is the better approach to select a state statute applicable generally to statutory causes of action than to hunt for state causes of action which are similar to RICO predicate acts. Not only does such an approach recognize the *sui generis* nature of RICO, but it also is more likely to avoid discrimination against the Federal claim. *Malley-Duff*, 792 F.2d at 352-353.

B. The Court of Appeals does not articulate its reasons for saying that "[b]ecause a civil RICO claim is best characterized as an action for treble damages, and such an action is penal in nature. . . , it follows that the two-year statute of limitations period for actions based on a statutory penalty in Illinois should also apply to all civil RICO claims." See App. p. 9, *infra*. That conclusion depends upon two separate propositions: that actions for treble damages are penal and that such actions are the kind of penalty to which § 13-202 of the Illinois Code of Civil Procedure applies. The first proposition is invalid under federal law because it is well settled that the presence of a treble damage remedy does not convert an otherwise remedial statute, such as RICO, to a penal law. See *Wilson v. Garcia*, 471 U.S. 261, 269-270, n. 19 (1985). The court's assertion that the prospect of recovering treble damages motivates claimants and "creates incentives for citizens

to act as private attorneys general" (see App. p. 8, *infra*) does not support such conversion, as stated in *Malley-Duff*:

> Civil RICO is clearly not a forfeiture statute—the recovery of a successful private plaintiff is based on the injury sustained ("threefold the damages he sustains and the cost of the suit, including reasonable attorney's fee"), not on what the defendant has gained through illegal conduct. Nor do we think the treble damage provision is primarily intended as a penalty. *See Task Force Report* at 391. More important, it is an incentive for private attorneys general to bring suit.
>
> 792 F.2d at 351.

The second proposition is actually a characterization of state law. If fully articulated, the proposition would be that an action for treble damages is within the term "statutory penalty" as used in the statute of limitations. But state law cannot be used to characterize the federal right of action, and under federal law a treble damage action is not penal. See *Wilson v. Garcia*, 471 U.S. 261, 269-270, n. 19 (1985).

Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., 191 F.2d 912 (7 Cir., 1951), *Schiffman Bros., Inc. v. Texas Co.*, 196 F.2d 912 (7 Cir., 1952), and *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F.2d 284 (7 Cir., 1954), relied on by the majority of the Court of Appeals, held that Illinois law would characterize treble damage antitrust suits as actions for a penalty, but those cases are not in point because they relied exclusively on state law labels for their characterization of the federal remedy. See *Wilson v. Garcia*, 471 U.S. 261, 269-70, n. 19 and cases there cited. See especially *Schiffman Bros.*, 196 F.2d at 697, in which the Court treated as controlling a line of Illinois cases beginning with *Chicago, B. & Q. R. Co. v.*

Jones, 149 Ill. 361, 37 N.E. 247 (1894), which stated without explanation that statutory treble damage actions by shippers against railroads were governed by the period of limitations for statutory penalties. The Court of Appeals in the instant case apparently relied upon the *Hoskins Coal* cases in support of its characterization (see App. p. 8, *infra*). As stated in the court's footnote 1, the *Hoskins Coal* cases were incorrect in characterizing the federal antitrust claim according to state law. The court goes on to say, however, that their "ultimate conclusion" as to characterization was correct. This seems to mean that the cases reached the right result for the wrong reason. It is difficult to see how that fact gives the cases any standing as authorities. Thus, the most significant portion of the court's reasoning not only is without support in federal law, but still rests on the authority of state-law decisions.

We note parenthetically that it is unlikely that Illinois courts would today classify a treble damages action as one for a statutory penalty. Compare the *Chicago, B. & Q.* case above with *M.H. Vestal Co. v. Robertson*, 277 Ill. 425, 115 N.E. 629 (1917) (claim is for a statutory penalty where purpose of statute is to punish defendant), and *McDonald's Corp. v. Levine*, 108 Ill.App.3d 732, 439 N.E.2d 475, 479-480 (2d Dist., 1985) (claim is for a statutory penalty only where "amount of liability is predetermined by the act and imposed without actual damages suffered by the plaintiff").

C. The adoption of a two-year statute of limitations discriminates against the RICO claim. *Wilson v. Garcia* requires the court, in selecting from among available state statutes of limitations, to consider whether a statute under consideration discriminates against or is inconsistent with the Federal claim. The majority in *Malley-Duff*, in speak-

ing of a one-year limitations period, expressed concern that a period so short might ". . . contravene the broad *remedial* purpose of civil Rico." (792 F.2d at 351; emphasis in original.) While the Illinois statute selected in the instant case provides a period of two years, that time still may be too short in many otherwise meritorious cases. See *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F.Supp. 673, 685 (N.D.Ind., 1982). The majority opinion refers briefly to this question, but only to observe that the rejected period in *Malley-Duff* and one district court case was only one year. This does not answer the contention that a two-year statute may cause some valid RICO claims to be lost. See also Judge Ripple's dissenting opinion, App. p. 15, *infra*.

D. A general or "catchall" statute of limitations is to be preferred to a more specific statute of limitations which may be analogized only imperfectly to the RICO cause of action. This is particularly true where, as here, the alternative period of limitations is so short to raise questions of discrimination against the Federal claim. In some recent cases, however, courts have selected statutes of limitations which governed "statutory liability" claims, or the like. Recent examples are *Cullen v. Margiotta*, No. 87-7066 et al. (slip opin., Feb. 2, 1987), and *Bankers Trust Co. v. Feldesman*, 648 F.Supp. 17 (S.D.N.Y., 1986), in which the courts chose a New York statute of limitations governing actions based upon a "liability . . . created or imposed by statute." That case and similar ones do not support selection of the two-year statute in this case. As the Court said in *Bankers Trust*, *Malley-Duff* rejected a Pennsylvania statute which applied to actions for statutory penalties and forfeitures on the ground that RICO actions are neither. By contrast, the New York statute was much broader and could be described as one of two catchall stat-

utes. The one selected, as interpreted by New York state courts, applied to unspecified statutory actions, while the so-called omnibus statute applied to unspecified actions generally. In Illinois, by contrast, there is only one level of catchall statute—§ 13-205. It governs statutory civil actions for which specific provision has not been made. *Montague v. George J. London Memorial Hospital*, 78 Ill. App.3d 298, 396 N.E.2d 1289, 1293 (1st Dist., 1979).

The authorities discussed above make it clear that, if a single state statute of limitations is to apply to all RICO civil actions, that statute is the "catchall" statute. But even if each case is to be considered individually, § 13-205 should still govern this case. That is because the essential predicate acts of which petitioner accuses respondents are acts of fraud, and the applicable Illinois statute for claims of fraud is the "catchall" provision of § 13-205. *Chicago Park District v. Kenroy, Inc.*, 78 Ill.2d 555, 560, 402 N.E.2d 181 (1980).

CONCLUSION

For the foregoing reasons, petitioner, MICHAEL TELLIS, submits that this petition for certiorari should be granted. In the alternative, petitioner requests that action on the petition be deferred pending decision in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, No. 86-497, and *Crown Life Ins. Co. v. Malley-Duff & Associates, Inc.*, No. 86-531, or that the Court take such other action as it may deem appropriate to preserve petitioner's claim

until the questions common to those cases and to this one can be resolved on the merits.

Respectfully submitted,

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April, 1987

APPENDIX

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No. 85-2704

MICHAEL TELLIS,

Plaintiff-Appellant,

v.

UNITED STATES FIDELITY & GUARANTY COMPANY and PARKER HOUSE SAUSAGE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 3557—**John F. Grady,** *Judge.*

ARGUED APRIL 1, 1986—DECIDED NOVEMBER 6, 1986

Before CUMMINGS, EASTERBROOK and RIPPLE, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This case comes to us on appeal following the district court's grant of a motion by defendants Parker House Sausage Co. ("Parker") and Parker's insurer, United States Fidelity & Guaranty Co. ("USF&G"), to dismiss plaintiff Michael Tellis' complaint. Plaintiff's complaint consisted of three counts, all based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"). This case gives us our first opportunity to determine the appropriate statute of limitations for a civil RICO claim. For the reasons stated herein, plaintiff's complaint is time-barred, and the dismissal of the complaint is affirmed on that basis only.

I

Our disposition of this case necessitates only a brief review of the facts as alleged by plaintiff. Plaintiff was employed by Parker from 1977 until May 21, 1979, when he was injured on the job. He subsequently required surgery and received disability payments from USF&G until February 1980. When plaintiff then sought to return to work, he was told that he had been discharged.

In March 1980, USF&G offered a lump-sum settlement payment to plaintiff, contingent upon the waiver of his claim against Parker under the Illinois Workers' Compensation Act. In order to induce plaintiff to accept this offer, the defendants told plaintiff that if he accepted this offer he would be returned to employment at Parker. Furthermore, to induce the Illinois Industrial Commission ("Commission") to approve this proposed settlement, USF&G said that plaintiff would be returned to work at Parker at a "light duty" job. Plaintiff subsequently accepted this offer on March 20, 1980, and soon thereafter reported to work at Parker, but he was denied reemployment.

On May 24, 1983, plaintiff brought the instant complaint, which consists of three counts all based on civil RICO. He essentially alleged that the defendants defrauded him and the Commission by falsely representing that plaintiff would be returned to light-duty work at Parker. Defendants moved to dismiss plaintiff's claim pursuant to Fed. R. Civ. P. 12(b)(6), arguing that plaintiff's RICO claim is barred by the exclusivity provisions of the Illinois Workman's Compensation Act, and also that plaintiff's RICO claim is barred by the statute of limitations contained in Ill. Rev. Stats. ch. 110, ¶ 13-202. The district court dismissed the complaint on the basis of the former argument. Both parties agree, however, that this Court is free to reach the statute of limitations issue and decide the case on that basis. We therefore reach the important and recurring question of the appropriate statute of limitations period for a civil RICO claim.

II

The Supreme Court recently faced an analogous problem when it had to decide the appropriate statute of limitations for § 1983 actions. *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938. There were two distinct aspects to the Court's analysis of the appropriate statute of limitations for a § 1983 claim in *Wilson*. The first aspect is that state law is the appropriate source of law for determining the statute of limitations so long as it is consistent with federal law or policy to do so. *Wilson*, 105 S. Ct. at 1942. The second aspect is, given that state law is the appropriate source of law, how should one select the appropriate statute of limitations under state law? In response to this second aspect, the Court set down a three-part process. The first step is to determine whether state law or federal law governs the characterization of the federal claim for statute of limitations purposes. *Wilson*, 105 S. Ct. at 1943. The second step is, assuming that federal law applies, to determine whether all such federal claims (in the instant case all civil RICO claims) should be uniformly characterized, or should instead be characterized on a case-by-case basis depending on the particular facts and circumstances of each individual case. *Id.* The third step is to characterize the essence of the federal claim in the instant case and select the most appropriate state statute of limitations given this characterization. *Id.*

Before we can apply these two aspects of *Wilson* to the instant case, we must note that § 1983 has its own rules of decision statute, 42 U.S.C. § 1988, upon which the Supreme Court relied in *Wilson*. By contrast, RICO lacks a statute analogous to 42 U.S.C. § 1988. However, a close examination of the role that 42 U.S.C. § 1988 played in *Wilson* indicates that this Court is fully justified in applying these two aspects of *Wilson* to civil RICO claims despite the lack of a statute analogous to 42 U.S.C. § 1988.

The first aspect of *Wilson* that we apply to the instant case is the proper source of law for determining the appropriate statute of limitations for a federal claim that

lacks its own explicit limitation period. In analyzing this aspect of the issue, the Supreme Court noted that it was "settled practice" to adopt a local statute of limitations period so long as it was not inconsistent with federal law or policy to do so. *Wilson*, 105 S. Ct. at 1942. Although the Court further noted that 42 U.S.C. § 1988 supported this approach, it is clear that there is strong support for this approach independent of 42 U.S.C. § 1988.

The second aspect of *Wilson* that we apply to the instant case is, given that state law is the appropriate source of law, how should a court select the appropriate statute of limitations under state law? In fashioning a three-part process as a general method for selecting the appropriate state statute of limitations for a federal cause of action which lacks its own time limitation, the Court did not base its decision on 42 U.S.C. § 1988. *Wilson*, 105 S. Ct. at 1943. The Court relied on 42 U.S.C. § 1988 only when it applied this general method to the task of selecting the appropriate state statute of limitations for § 1983 claims. Since 42 U.S.C. § 1988 was not the basis for the general method espoused in *Wilson*, there is no reason this general method should not apply to the selection of the appropriate state statute of limitations for civil RICO claims. We therefore both use Illinois law as the appropriate source of law for determining the statute of limitations in the instant case and apply the three-step process set forth in *Wilson* to make this determination.

In *Wilson*, the Supreme Court held that federal law governed the characterization of a § 1983 claim for statute of limitations purposes. We reach the same conclusion regarding a civil RICO claim for similar reasons. As a general matter the problem of characterizing a federal claim for statutory purposes has usually been held to be a question of federal law. *Wilson*, 105 S. Ct. at 1944. Additionally, the federal interests in uniformity and firmly-defined-but-easily-applied rules, relied on by the Supreme Court in *Wilson*, apply with equal force here and warrant the conclusion that federal law governs the characterization of RICO claims for statute of limitations purposes. *Malley-*

Duff & Associates v. Crown Life Insurance Co., 792 F.2d 341, 346 (3d Cir. 1986).

The second step is to determine whether courts should characterize all federal RICO claims in the same way, thereby resulting in a uniform statute of limitations period for all RICO claims, or instead characterize each individual RICO claim differently depending on the facts and circumstances of the particular RICO claim, thereby resulting in varying statute of limitations periods for RICO claims. The vast majority of courts have selected a uniform characterization of all RICO claims. Of the circuit courts of appeals that have faced this issue, the Third Circuit has adopted a uniform characterization, *Malley-Duff & Associates v. Crown Life Insurance Co.*, 792 F.2d 341, 349 (3d Cir. 1986), while the Eleventh Circuit has noted in dicta that after *Wilson* the case-by-case approach might well be foreclosed, *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1014 n.5 (11th Cir. 1986). Only the Sixth Circuit has adopted a case-by-case approach. *Silverberg v. Thomson McKinnon Securities, Inc.*, 787 F.2d 1079, 1083 (6th Cir. 1986). At the district court level, almost all the courts facing the issue have followed the uniform approach. See, *e.g., Davis v. A.G. Edwards & Sons, Inc.*, 635 F. Supp. 707, 711 (W.D. La. 1986); *Argosy v. Bradley*, 628 F. Supp. 1359, 1360-1361 (D. Utah 1986); *Morley v. Cohen*, 610 F. Supp. 798, 809 (D. Md. 1985); *Victoria Oil Co. v. Lancaster Corp.*, 587 F. Supp. 429, 431 (D. Colo. 1984). The same holds true for the district courts in this Circuit. See, *e.g., Ambrosino v. Rodman & Renshaw, Inc.*, 635 F. Supp. 968, 973-974 (N.D. Ill. 1986); *Hennessey v. Connecticut General Life Ins. Co.*, No. 84 C 10582 (N.D. Ill. June 19, 1986); *Davis v. Smith*, 635 F. Supp. 459, 462 (N.D. Ill. 1985); *Electronic Relays (India) Pvt. Ltd. v. Pascente*, 610 F. Supp. 648, 650 (N.D. Ill. 1985); *Baselski v. Paine, Webber, Jackson & Curtis, Inc.*, No. 80 C 3157 (N.D. Ill. Nov. 22, 1985); *Long Grove Country Club Estates v. Village of Long Grove*, No. 82 C 6868 (N.D. Ill. Oct. 7, 1985); *Bolingbrook Properties II v. Irvin*, No. 84 C 10480 (N.D. Ill. Aug. 8, 1985); *Taylor v. Central States, Southeast & Southwest*

Areas Pension Fund, Nos. 83 C 2206 & 83 C 6283 (N.D. Ill. Nov. 6, 1984).

We follow the majority of courts and select the uniform-characterization approach. Because of the nature of RICO, a single RICO claim in a particular case could be characterized in differing ways so as to create conflicting statute of limitations periods if the uniform-characterization approach were not adopted. *Wilson*, 105 S. Ct. at 1945-1947; *Malley-Duff*, 792 F.2d at 348-349; *A.G. Edwards*, 635 F. Supp. at 711; *Electronic Relays*, 610 F. Supp. at 650. This is because many different types of acts can serve as predicate acts giving rise to a single RICO claim. Each of these predicate acts, although part of a single civil suit alleging a violation of civil RICO, may be sufficiently unrelated to one another so that each act viewed in isolation would be subject to different statute of limitations periods. If a court did not follow the uniform-characterization approach, it would then be saddled with having to decide which predicate act predominates the RICO claim, and then choose the statute of limitations period associated with that predominating act. The strong interests in uniformity and certainty and the desire to avoid time-consuming litigation that would be needed to determine the appropriate statute of limitations period for such cases warrant an adoption of the uniform-characterization approach. The Supreme Court relied on similar reasons in selecting the uniform-characterization approach for § 1983 claims, *Wilson*, 105 S. Ct. at 1947; those reasons apply to RICO claims with equal force.

Having selected the uniform-characterization approach, the final step is to select the one Illinois statute of limitations that best characterizes all civil RICO claims. There are two alternatives: Ill. Rev. Stat. ch. 110, ¶ 13-202 (1985), which creates a two-year period for all actions for a statutory penalty, and Ill. Rev. Stat. ch. 110, ¶ 13-205 (1985), which creates a five-year period for actions based on common law fraud, as well as "all civil actions not otherwise provided for." Our sister circuits have differed in their characterization of civil RICO claims and thus in

their selection of statute of limitations for civil RICO claims. The Second and Ninth Circuits have both selected a three-year period for actions based on a statute; neither court discussed other alternative characterizations. *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, 755 F.2d 239, 249 (2d Cir. 1985); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984). The Third Circuit has selected a six-year "catchall" limitations period, *i.e.*, a statute of limitations for actions not governed by a more specific period of limitations. *Malley-Duff*, 792 F.2d at 351-352. Several district courts have also selected catchall limitations periods. See, *e.g.*, *Morley*, 610 F. Supp. at 809; *Victoria Oil*, 587 F. Supp. at 432. Other district courts have noted that a large number of civil RICO claims are based on fraud, and have selected the appropriate limitations period for actions based on fraud. See, *e.g.*, *A.G. Edwards*, 635 F. Supp. at 711-714; *Argosy*, 628 F. Supp. at 1360-1361. Parenthetically, these cases are of limited value, since the choice of limitations periods faced by these other courts differs from our choice under Illinois law, and hence this difference may have affected the characterization of civil RICO claims made by these other courts. In our own Circuit, the district courts sitting in Illinois have largely selected the two-year period for actions for a statutory penalty. See, *e.g.*, *Ambrosino*, 635 F. Supp. at 974; *Hennessey*, No. 84 C 10582; *Wabash Pub. Co. v. Dermer*, No. 84 C 6766 (N.D. Ill. May 12, 1986); *Electronic Relays*, 610 F. Supp. at 652-653; *Baselski*, No. 80 C 3157; *Long Grove Country Club Estates*, No. 82 C 6868; *Bolingbrook Properties II*, No. 84 C 10480; *Taylor*, Nos. 83 C 2206 & 83 C 6283. Two judges have analogized civil RICO claims to fraud claims and selected a five-year period. *Davis*, 635 F. Supp. at 714; *Griggs v. Robinson Securities*, No. 84 C 4679 (N.D. Ill. May 9, 1985).

In our view a civil RICO claim is best characterized as an action for treble damages. The treble damages provision, 18 U.S.C. § 1964(c), is the most significant aspect of civil RICO. The vast majority of injuries suffered by civil RICO plaintiffs could be remedied under state law;

it is largely because of the treble damages provision that these plaintiffs seek a remedy under civil RICO in federal court. See *Electronic Relays*, 610 F. Supp. at 651. The treble damages provision is also significant because it gives incentives to private citizens to help law enforcement authorities police racketeering activity, *i.e.*, creates incentives for citizens to act as private attorneys general. *Id.* In summarizing the applicability of RICO to civil suits brought by private persons, Congressman Poff, a chief spokesman for the bill, focused exclusively on the treble damages provision, further underscoring its significance. 116 Cong. Rec. 35,295 (1970) (cited in *Electronic Relays*, 610 F. Supp. at 651). Finally, the Supreme Court's discussion of the legislative history of RICO in *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, demonstrates that the treble damages provision was the genesis of the civil RICO action for private litigants. *Id.* at 3280-3281. The Supreme Court stated that prior to the addition of the treble damages provision, "[t]he civil remedies in the bill passed by the Senate, S. 30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d)." *Id.* at 3280.

This Court has previously held that a treble damage antitrust suit is most appropriately characterized as an action for a penalty. *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.*, 191 F.2d 912 (7th Cir. 1951), certiorari denied, 342 U.S. 947 (this case subsequently became obsolete when Congress enacted a statute of limitations for civil antitrust actions).[1] The treble damages provision in

[1] Plaintiff attacks this argument by claiming that the Supreme Court rejected the reasoning of *Hoskins Coal* in *Wilson*. This is not completely accurate. In *Hoskins Coal*, the characterization issue was determined as a matter of state law. In *Wilson*, the Supreme Court noted that "[t]he question whether antitrust claims were more analogous to penal claims or to claims arising in tort, contract, or on a statute, was treated as a matter of federal law by the better reasoned authority." *Wilson*, 105 S. Ct. at 1944 n.19. We agree that this aspect of *Hoskins Coal* was incorrect, and in-

(Footnote continued on following page)

§ 1964(c) is virtually identical to the damages provision in the antitrust laws. See 15 U.S.C. § 15. This parallelism is not merely coincidental, as Congressman Poff explained in his summary of the House version of RICO: "[RICO] represents, in large measure, an adaptation of the machinery used in the antitrust field to redress violations of the Sherman Act and other antitrust legislation." 116 Cong. Rec. 35,295 (1970). Both the Supreme Court and this Court have noted in other contexts the strong parallel between the treble damages remedy in antitrust law and the treble damages remedy under civil RICO. See *Sedima*, 105 S. Ct. at 3282 n.8; *Carter v. Berger*, 777 F.2d 1172 (7th Cir. 1985). In *Carter*, we relied on an analogy to the antitrust laws in ascertaining the real party in interest for purposes of prosecuting a civil RICO claim. In drawing the analogy, we placed special emphasis on the fact that the ability to recover treble damages is a central characteristic of both an antitrust and a civil RICO cause of action. 777 F.2d at 1175-1176. Because a civil RICO claim is best characterized as an action for treble damages, and such an action is penal in nature, *Electronic Relays*, 610 F. Supp. at 652, it follows that the two-year statute of limitations period for actions based on a statutory penalty in Illinois should also apply to all civil RICO claims.

Admittedly, many civil RICO claims are based on fraud, so that if we uniformly characterized civil RICO claims as fraud claims and selected a five-year limitations period, we would frequently be correct. But a quick review of the possible predicate acts for a civil RICO claim shows that many acts quite apart from fraud serve as predicate

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[1] *continued*
deed we make our characterization today of a civil RICO claim as a matter of federal law. However, the proper source of law for making the characterization of civil antitrust claims does not detract whatsoever from the ultimate conclusion in *Hoskins Coal* that the proper characterization of a civil antitrust claim was as an action for treble damages.

acts. 18 U.S.C. § 1961(1); see *Malley-Duff*, 792 F.2d at 351 (rejecting a characterization of RICO claims as fraud claims). Moreover, given the recent trend towards requiring more than merely the commission of two predicate acts to constitute a "pattern of racketeering activity," see *Morgan v. Bank of Waukegan*, No. 85-2675 (7th Cir. Oct. 23, 1986), it is likely that so-called "garden variety" fraud claims will be a decreasing percentage of civil RICO claims in the future. Therefore it is preferable to seek a common aspect of all civil RICO claims as the basis for a uniform characterization, rather than selecting one type of predicate act to represent all civil RICO claims.

Although several other courts have not reached the same result as here, upon closer inspection the potentially adverse impact of these other decisions is not significant. Many of these other courts, including both the Second and Ninth Circuits, never even considered our characterization as a possible alternative. *Durante*, 755 F.2d at 249; *Compton*, 732 F.2d at 1433; *Morley*, 610 F. Supp. at 609. A few courts, including the Third Circuit, did consider and reject our characterization, but in those relevant states the limitations period for a statutory penalty was only one year, not two years. *Malley-Duff*, 792 F.2d at 351; *Argosy*, 628 F. Supp. at 1360-1361.

Having selected two years as the appropriate limitations period, plaintiff's claim must be dismissed as time-barred. On this basis, the district court's dismissal of plaintiff's claim is affirmed.

RIPPLE, *Circuit Judge*, dissenting. Several centuries from now, when the archeologists have unearthed a copy of the Federal Reporter and turned it over to the legal historians for study and analysis, our descendants will indeed be puzzled to discover that a society in which judicial resources were such a scarce "commodity" expended so much of that "commodity" searching its state codes for "analogous" limitation periods. I doubt very much that, at least in this regard, our priorities will command much admiration.

Fixing the statute of limitation for a particular cause of action is a legislative function. Indeed, it is not a particularly difficult or complex legislative function. In most circumstances, it can be handled in a sentence. Yet, in a significant number of statutory schemes of nationwide application, Congress has failed to fulfill this basic responsibility and has left the courts to spend hundreds of hours—and thousands of dollars in government money—searching for a substitute solution.[1] Meanwhile, justice is delayed, not only in the cases in which limitation issues arise but also in the many cases, often raising far more serious questions, which must wait while this tedious process takes place.

Congress had an opportunity to settle the limitations issue in civil RICO[2] but it did not take the time to do so. Therefore, after much litigation and conflicting decisions among the district courts,[3] this court, like its sister

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[1] Dissenting from denial of certiorari in *Preuit & Mauldin v. Jones*, ____ U.S. ____, 106 S. Ct. 893, 895 n.3 (1986), Justice White similarly suggested that the Congress ought to extricate the courts from the same exercise with respect to limitations in section 1983 actions. *See generally Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938 (1985).

[2] For a description of the Congress' consideration of the statute of limitation issue, see *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 684 (N.D. Ind. 1982).

[3] *See* Maj. Op. at 5-6.

circuits, must now undertake this difficult and necessarily imprecise task.[4]

Given the difficulty of the court's task and the imprecision which it necessarily entails, I am reluctant to part company from my brothers in their conscientious attempt to reach a principled result. This reluctance is reinforced by the thoughtful efforts of a good many district judges who, after giving the matter considerable thought, concur with the majority. Nevertheless, after studying the majority opinion and its precursors from the district courts, I must conclude that the judges on several of our sister circuits have made a more compelling case. Accordingly, I respectfully dissent.

The court quite properly notes that, when confronted with the difficult task of choosing the most analogous state statute of limitations, the appropriate approach is to "characterize the essence of the federal claim in the instant case and select the most appropriate state statute of limitations given this characterization." Maj. Op. at 3 (citing *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 1943 (1985)). However, when it turns to that task, instead of focusing on the "essence" of the civil RICO *cause of action*, the court focuses only on the *remedy* provided by that cause of action.

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[4] As the *ABA Task Force Report* noted:

> [T]he law regarding the applicable statute of limitations for Civil RICO claims is confused, inconsistent, and unpredictable. The current approach is virtually guaranteed to incite complex and expensive litigation over what should be a straightforward matter. In addition to disputes over the proper characterization of the RICO claim, which indeed may vary depending on whether it is governed by federal or state law, the current approach raises the possibility of further conflicts over the appropriate choice of law in multistate factual situations. (footnotes omitted)

Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. Sec. Corp. Banking & Bus. L. Rep. 391-92 [hereafter cited as *ABA Task Force Report*].

This methodological lapse is, I respectfully suggest, at least partially attributable to the court's over-reliance on the analogy of RICO to the Clayton Act. As this court has noted just recently, the references to the antitrust laws in the legislative debates on RICO dealt basically with the establishing of the treble damages remedy. *Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 315 (7th Cir. 1985); *see also Schacht v. Brown*, 711 F.2d 1343, 1358 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983). The antitrust laws and civil RICO statutes do not have the same purpose. Although RICO and the Clayton Act both require injury to business or property for standing to sue, there is little overlap between the types of conduct each prohibits.[5] The RICO statute is a *sui generis* exercise of the Congress' legislative power aimed at curtailing a broad spectrum of dishonesty and corruption in business and government. In selecting a statute of limitations, that broad purpose—and the myriad of schemes which fall within it—must be the focus of the court's attention.

Equally disturbing is the court's characterization of RICO as no more than a federal surcharge against conduct already forbidden under state law. As the *ABA Task Force Report* noted, "RICO is manifestly directed towards activities that go beyond the mere commission of predicate offenses. . . ." *Report of the Ad Hoc Civil RICO Task*

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[5] For the same reasons, it would be inappropriate to implement the methodology of *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 172 (1983) and "turn away from state law" in favor of the four-year statute of limitations in the Clayton Act. "[S]tate law remains the norm for borrowing limitations periods," *id.* at 171, and the substantial differences in the purposes of the two statutes and in the conduct they proscribe hardly justifies deviation from the norm. Indeed, since Congress consciously incorporated some features of the Clayton Act in enacting RICO but failed to use the same statute of limitations, this court should be particularly hesitant to take that step. *See ABA Task Force Report* at 392. *But see A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 337-41 (3d Cir. 1986) (Sloviter, J., concurring).

Force, 1985 A.B.A. Sec. Corp. Banking & Bus. L. Rep. 390-91. RICO was designed to protect a distinct federal concern—the harm inflicted on business or government by a pattern of illegal activity.[6] The statute is an explicit recognition that illegal conduct of a continuing nature presents a special threat. Indeed, it was a realization "that civil RICO is truly *sui generis* and that particular claims cannot be readily analogized to causes of action known at common law . . ." that led the Third Circuit to conclude that RICO actions in the Commonwealth of Pennsylvania should be governed by that state's "residual 'catchall' statute of limitations for actions, primarily based on statute, that are not governed by any more specific period of limitations." *Malley-Duff & Assoc., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341, 352, 353 (3d Cir. 1986); *accord Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984) (applying the California three-year period for actions based on statute); *see also Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, 755 F.2d 239, 249 (2d Cir.), *cert. denied*, 105 S. Ct. 3530 (1985).[7]

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[6] As the Supreme Court noted in *United States v. Turkette*, 452 U.S. 576, 586 (1981), "Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure." Indeed, in *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985), the Supreme Court emphasized the need for "continuity plus relationship," in establishing a "pattern of racketeering activity." *Id.* at 3285 n.14. Of course, once the "pattern" is established, the plaintiff may recover for "the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *Id.* at 3286.

[7] *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, 755 F.2d 239 (2d Cir.), *cert. denied*, 105 S. Ct. 3530 (1985), was cited by the Third Circuit in *Malley-Duff & Assoc., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341, 347-48 (3d Cir. 1986), as authority for the proposition that a single statute of limitations should govern all civil RICO actions. *Malley-Duff*, 792 F.2d at 347-48 (N.Y. Civ. Prac. L. & R. 214(2) (McKinney Supp. 1983-1984)) (governing actions to enforce a liability created by statute). However, in *Bankers Trust*

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In my view, the approach of the Third Circuit in *Malley-Duff* is the most realistic approach to the problem of selecting an appropriate statute of limitations for civil RICO actions. Rather than grounding the analysis in an analogy to another statutory cause of action aimed at a very different evil—an analogy destined to limp—it recognizes civil RICO as a unique statutory cause of action designed to curb a unique danger. Accordingly, I would apply the Illinois five-year period for "all civil actions not otherwise provided for." This phrase, I respectfully suggest, describes accurately civil RICO. It is also of sufficient length to provide ample opportunity for the putative litigant to file a complaint which intelligently describes the precise nature and extent of his injuries. It is not at all certain, I suggest, that the two-year period adopted by the court today will afford all litigants who might invoke the protection of civil RICO ample time to accomplish that feat.

This court's deviation from the course of decision emerging in the other circuits has one salutary aspect. Perhaps the Congress will now complete its legislative work and permit the courts to use their time more effectively by applying rather than making law.[8]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[7] *continued*
v. Feldesman, No. 82 Civ. 5590 (S.D.N.Y. Sept. 3, 1986), the court held that *Durante* could not be read as establishing such a general rule. Nonetheless, the district court in *Bankers Trust* did adopt such a rule.

[8] *See ABA Task Force Report* at 393.

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 6, 1986.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL TELLIS,

Plaintiff-Appellant,

No. 85-2704 vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY and PARKER HOUSE SAUSAGE CO.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 3557—**John F. Grady,** *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, on the basis that plaintiff-appellant's claim is time-barred, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 9, 1987.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

MICHAEL TELLIS,

Plaintiff-Appellant.

No. 85-2704 v.

UNITED STATES FIDELITY & GUARANTY COMPANY and PARKER HOUSE SAUSAGE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 3557—**John F. Grady,** *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, and the answers filed by defendants-appellees, a vote of the active members of the Court was requested and less than a majority* of the active members of the Court have voted to grant a rehearing *en banc*. A majority** of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

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* Circuit Judges Cudahy and Ripple voted to grant the petition for rehearing *en banc*.

** Circuit Judge Ripple voted to grant the petition for rehearing.

[Dated September 6, 1985]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL TELLIS,

Plaintiff,

No. 83 C 3557 v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, et al.,

Defendants.

MEMORANDUM OPINION

This case is before us on the defendants' motions to dismiss plaintiff's first amended complaint, or to strike certain portions of the complaint. The complaint consists of three counts, all based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"). The plaintiff, Michael Tellis, claims that the defendants, his former employer Parker House Sausage Co. ("Parker"), and Parker's insurer, United States Fidelity & Guaranty Co. ("USF&G") perpetrated a fraud upon him and the Illinois Industrial Commission ("IIC") when they falsely stated to the IIC that plaintiff would be returned to light duty work at Parker. In reliance upon this allegedly false statement made at a hearing before the IIC, plaintiff claims that he and the IIC accepted a settlement for plaintiff's worker's compensation claim against Parker which would not have been accepted absent the misrepresentation.

We originally dismissed this claim pursuant to Fed. R. Civ. P. 12(b)(6) because plaintiff did not allege two mailings in furtherance of the alleged scheme to defraud. *Tellis v. United States Fidelity & Guaranty Co.*, No. 83 C 3557, Memorandum Op. (N.D. Ill. Jan. 10, 1985). Plaintiff has amended his

complaint to add other mailings which he states were made in furtherance of the scheme. Defendants claim that the new mailings do not remedy the claim's infirmities, and also renew arguments previously raised which we did not address in our first opinion.

Because we believe that plaintiff has corrected the infirmities of his original complaint upon which we based our first opinion,[1] we must now rule upon one of the defendants' previous arguments, which presents a difficult preemption issue. Defendants argue that plaintiff's RICO claim is barred by the exclusivity clauses of Illinois' Worker's Compensation Act, Ill. Rev. Stat. ch. 48, § 138.1 *et seq.* Pertinent portions of the Act state that "no common law or statutory rights to recover damages . . . other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act"; in any case where "there has been any unreasonable underpayment of compensation . . . then the commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award"; and whenever the IIC finds that the employer or insurer "has been guilty of delay or unfairness towards an employee in the adjustment, settlement, or payment of benefits . . . or has been guilty of unreasonable or vexatious delay, [or] intentional under-payment of compensation benefits . . . within the purview of the provisions of paragraph 19 of this Act," it may assess all or part of the attorney's fees and costs against the employer or insurer. Ill. Rev. Stat. ch. 48, §§ 138.5(a), 138.19(k), 138.16.

The Illinois Supreme Court has construed these paragraphs to bar an independent state cause of action by an employee for intentional infliction of emotional distress based upon his employer's conduct in handling his worker's compensation claim. *Robertson v. Traveler's Insurance Co.*, 95 Ill.2d 441, 448 N.E.2d 866 (1983). The Court stated that since the employee had an opportunity to seek the statutory penalties contained in §§ 138.19(k) and 138.16, he cannot recover for delay in an action at common law:

> To permit such a course would invite the indefinite prolonging of litigation and risk double recoveries and inconsistent findings of fact, a result which the legislature, in enacting a system of compensation in place of common law remedies certainly wished to avoid.

Id. at 451, 448 N.E.2d 871. *See also Hicks v. Board of Education for School District 189*, 177 Ill. App.3d 974, 397 N.E.2d 16 (5th Dist. 1979) (exclusive remedy for malicious delay is complaint to IIC pursuant to § 138.19(k)).

Defendants argue that under the above-cited sections of the Act, plaintiff should have returned to the IIC with his charges, reopened his claim, and received his statutory penalties, if merited. Under the exclusivity clauses of the Act, his only remedy is with the IIC.

We agree that under the Act, plaintiff's suit is barred. The Act states that no statutory right to damages is available to an employee covered by the Act, and that when an employer or insurer deliberately underpays an employee, as alleged here, the employee's exclusive remedy is a 50 percent statutory penalty. The Supreme Court of Illinois has confirmed this interpretation of the Act, stating that to allow a remedy outside the statutory penalties of the Act would cause indefinite prolonging of litigation, double recoveries, and inconsistent findings of fact.

The question here is whether RICO preempts the exclusivity clauses of the Act, allowing this suit. To the extent that a state law conflicts with a federal law, the state statute is void under the Supremacy Clause of the Constitution. U.S. Const., art. VI, cl. 2. *See Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982). A conflict is found "where compliance with both federal and state regulations is a physical impossibility," or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id., citing Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Thus, courts find a conflict if the state law's language is directly contradictory to that of the federal law;

if the state law's effect is to discourage conduct the federal law seeks to encourage; or if comprehensive federal legislation has preempted all state regulations on that subject. *See* L. Tribe, *American Constitutional Law*, §§ 6-23-25 at 376-86 (1978).

Nothing in the RICO statute's language or legislative history indicates that Congress meant to vitiate the exclusivity clauses of state and federal compensation statutes. Courts have found that state exclusivity clauses do not violate the Constitution, *see* A Larson, *Larson's Workmen's Compensation Law*, § 65.20 at 12-10-12-11 (1983), and that the "exclusiveness rule relieves the employer not only of common-law tort liability, but also of statutory liability under all state and federal statutes." *Id.* at § 65.30 at 12-11. The only actions not barred by such exclusivity clauses are those based on a federal constitutional right, as opposed to a common law or statutory right. *See Walker v. Rowe*, 535 F.Supp. 55, 57 (N.D. Ill. 1982). *See also Rosa v. Cantrell*, 705 F.2d 1208 (10th Cir. 1982), *cert. denied*, 104 S.Ct. 85 (1983).

On the other hand, pragmatically, RICO would allow a claim here which the state act bars, resulting in a limitation, of not a conflict. The RICO statute states that nothing in it supersedes other federal or state law affording civil remedies in addition to RICO remedies, Pub. L. 91-452, § 1, *reprinted in* 18 U.S.C.A. § 1961 at 233, indicating that RICO was meant to supplement and enhance other actions. The treble damage remedy, along with the predicate offense nature of the RICO cause of action, reinforce this enhancement nature of a RICO claim. Therefore, one could argue that since Congress' purpose was to provide an additional and enhanced cause of action based upon certain criminal predicate offenses, this purpose would be undermined by a ruling preventing access to this separate remedy.

Weighing these considerations, we believe federal policy dictates that plaintiff's action be barred. Congress has passed numerous federal compensation laws with exclusivity clauses, such as the Longshoremen's and Harbor

Worker's Compensation Act, 33 U.S.C. § 905. Federal courts have enforced such clauses numerous times, *see Larson*, § 65.31 at 12-12. When an injury is covered by a federal or state worker's compensation statute, federal courts have held that actions based upon the Federal Torts Claims Act are barred. *Id.* at § 65.32. *See Griffin v. United States*, 703 F.2d 321 (8th Cir. 1983). These laws and cases construing such laws make it clear that Congress approves of the policy of protecting the employer from multiple claims in return for the employer's automatic liability under such statutes. In the absence of any clear indication that RICO was designed to supersede the purpose of the exclusivity clauses in these numerous federal and state statutes, we will not find such a purpose and a conflict between RICO and these statutes. In the instant case, after allegedly being defrauded and learning that he would not be reemployed, plaintiff could easily have returned to the IIC and reopened his claim. By failing to return to the IIC, he is attempting the duplicative litigation condemned in *Robertson* and implicitly disapproved in the exclusivity clauses of state and federal statutes. Because the federal policies behind the RICO statute do not appear to conflict with those other federal policies encouraging the exclusive settlement of employment compensation disputes under compensation statutes, we find no conflict between Illinois' Worker's Compensation Act and RICO. The Supremacy Clause does not call for preemption of the Illinois Act, and plaintiff's claim is barred under the Act.

CONCLUSION

Defendants' motions to dismiss are granted, and plaintiff's claim is dismissed with prejudice.

DATED: SEP 6 1985

ENTER: /s/ JOHN F. GRADY
United States District Judge

[1] Plaintiff's amended complaint does allege at least two mailings in furtherance of a scheme to defraud. We have already held that one mailing alleged in the original complaint and realleged here, the mailing of plaintiff's check, can form the basis of a mail fraud claim, since the alleged scheme did not reach fruition until he received his money. *Tellis*, Memorandum Op. at 3; *see* United States v. Maze, 414 U.S. 395, 403 (1973). In his amended complaint, plaintiff added several other mailings preceding the date the check was mailed. At least one of these mailings, notice to plaintiff to attend the IIC hearing, is sufficiently related to the alleged scheme to form the basis of another mail fraud claim. Parker argues that this notice mailing is too "tenuous" to support a mail fraud charge. Memorandum in Support of Motion to Dismiss Amended Complaint at 5. In order to form the basis of a mail fraud action, however, a mailing need only be made for the purpose of executing the scheme to defraud. The mailing itself need not be essential to the scheme. United States v. Clark, 649 F.2d 534, 540 (7th Cir. 1981). All that is required is that the mailing be a "natural concomitant of a transaction that is essential to the fraudulent scheme." United States v. Lea, 618 F.2d 426, 430 (7th Cir.), *cert. denied*, 449 U.S. 832 (1980). Here, the IIC hearing was an event essential to the scheme, and notice to plaintiff to attend the hearing was foreseeable. Therefore, the mailing can support a mail fraud action, plaintiff has alleged two connected mail frauds, and the "pattern" requirement of § 1961(5) is met in plaintiff's amended complaint.

Parker also argues that the mailings all concerned USF&G, not Parker. The amended complaint does not state that Parker mailed, received or caused to be mailed any relevant material. Memorandum in Support at 5. Plaintiff has alleged, however, that Parker and USF&G jointly participated in the scheme to defraud. Therefore, Parker can be held accountable for USF&G's mailings. *See* United States v. Dick, 744 F.2d 546, 552 (7th Cir. 1984).